No. 3846

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CROWLEY LAUNCH AND TUGBOAT COMPANY (a corporation),

Appellant,

vs.

UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION (a corporation), and the American Ship "MONONGAHELA", her engines, tackle, apparel, etc.,

Appellees,

UNITED STATES OF AMERICA,

Claimant.

REPLY BRIEF FOR APPELLANT (LIBELANT).

THACHER & WRIGHT,
Proctors for Appellant (Libelant).

THOMAS A. THACHER,
HARRISON A. JONES,
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REPLY BRIEF FOR APPELLANT (LIBELANT).

Separate consideration will be given to each of the several parts into which the brief for the appellees falls.

I.

ARGUMENT THAT APPELLANT SEEKS TO MAKE APPELLEES INSURERS.

The appellees urge that the appellant seeks to make the appellees insurers. In so urging the ap-

pellees overlook the fact that if the charterer was an insurer it would be liable, irrespective of negligence. No one claims this, however, and insurance is not in any way involved in the present case. The demise charterer of a barge must, however, show its freedom from negligence; or, in other words, must show everything that it did and establish that what it did was not negligence.

II.

ARGUMENT THAT BURDEN OF PROOF NEVER SHIFTS.

This doctrine, first strongly advocated by Professor James Bradley Thayer, is of more academic than practical interest. Most judges, including many distinguished judges of the United States Supreme Court, have, after a plaintiff has made a *prima facie* case, ordinarily referred to the burden of proof as being on the defendant. Whether the ordinary term, "burden of proof", is used, or whether Professor Thayer's phrase, "burden of procedure", makes no practical difference. The fundamental question remains the same: what is a demised charterer obligated to prove when a chartered vessel in its possession is destroyed? Unless the Terry & Tench and the Swenson cases have been overruled, the charterer must show: how the accident occurred, and that the charterer was free from negligence.

III.

THE HASTORF AND HILDEBRANDT CASES.

The appellees do not attempt to distinguish or criticise the Terry and the Swenson cases. Reliance is rather put on the Hastorf and Hildebrandt cases.

The Hastorf case is clearly distinguishable from the present case. In the Hastorf case a scow with an admittedly small load began to leak. The scow master on board and employed by the owner testified to what was evidently a fantastic method of loading.

The Court said:

> **"This story is wholly denied by the stevedores, and their denial is aided by the one disinterested witness, an employee of the owner of the pyrites.** * * *
>
> "In this case libelant's witnesses describe a style of loading not only improper, but foolish and unnecessary. Their testimony was rejected below, as we would have rejected it had the testimony been taken by deposition and we had been the first to examine it judicially. * * *
>
> **"Considering, therefore, that the apparently disinterested evidence favors appellee,** the case somewhat resembles The Florida, 256 Fed. 22; 167 C. C. A. 294, and as in that case we affirm the decree * * *."

The appellees by parallel columns seek to show that the Hastorf case and the present case are similar. We take the liberty of repeating the columns, with our comment:

"Hastorf Case.	**"Case at Bar.**
"1. An unexplained leak followed by a list and capsizing."	"1. An unexplained leak followed by a list and capsizing."

Our comment: There was not an *unexplained* leak in the present case. Captain Langren on deposition stated:

> "*From the position I saw the lighter in, I would say she would open up her seams and break her back.*
>
> Q. *Why?*
>
> A. *Because she was buckling, she was unevenly loaded; the outboard corner was more heavily loaded than the amidships section of the barge, having a tendency to twist the barge and break the barge's back, and open up the bottom seams and side seams, causing the barge to take water*" (Langren, 195).

(For the testimony of other witnesses showing cause of buckling see opening brief.)

"2. A charge of negligence in the loading of a vessel by the charterer."	"2. A charge of negligence in the loading of a vessel by the charterer."

Our comment: This is correct. To constitute a cause of action in a demise case of this kind there must be an allegation of negligence.

"3. Conflicting evidence offered in open court upon this issue."	"3. Conflicting evidence offered in open court upon this issue."

Our comment: This is correct, but is in a measure misleading. In the Hastorf case the evidence was all taken in open court. Here 135 pages of testimony were taken in open court and 83 pages by deposition. **The testimony of the three independent witnesses, Langren, Zecher and Messick, was all by deposition, and constituted the most important evidence in the case.**

"4. The issue as to the propriety of the loading resolved in favor of the respondent."	"4. The issue as to the propriety of the loading resolved in favor of the respondent."

Our comment: The District Court only went so far as to say that the *method* of loading was not improper. Such a finding as "4" above was in the proposed decree, which the Court refused to sign.

"5. The court resorted to the inference that the scow had leaked from inherent defects."	"5. The court resorted to the inference that the scow had leaked from inherent defects."

Our comment: The Court said: "It is just as likely that the barge, being old, made more water than usual, and that this was the cause of her loss." The Court made no finding that the barge leaked from inherent defects and there was no evidence that it usually made water.

The only independent witnesses in the case at bar (Langren, Zecher, Messick and Jones) **testified that the barge was overloaded and badly loaded.** No one testified that the barge was not in a tender condition after 2 P. M. on the day of the accident. The only witnesses produced by the respondents to show the condition of the lighter after that time were two employees, Scott and Woodside. These witnesses were on the "Monongahela" only occasionally and merely testified that looking at the barge at about 3:30 she seemed to be on an even keel (Scott, Woodside). The respondent did not call the mate of the "Monongahela" or any witnesses who were on the "Monongahela" all or a greater part of the time from 2 P. M. to 4:40 P. M.

The Hildebrandt case involved the following state of facts:

John Hildebrandt chartered a scow to the Flower Lighterage Company. The charter was the demise form usual in New York City, under which the master goes with the scow and is paid by the owner. The scow took on a part cargo and on the night in question was left in good condition by the master on the north side of Pier 45, Brooklyn. At about 9 P. M. that night the tug "President", acting independently, and not an agent of the lighterage company, moved the scow to the south side of the pier and put another barge alongside of her. At 3 A. M. she was found sunk with a plank broken in at the port bow corner.

An action was filed against the lighterage company and the tug "President". The libelant urged that both respondents be held liable, with execution to issue in the first instance against the tug "President" (Point III, brief P. M. Brown; see appellees' brief, V).

The Court in its oral opinion held "that while it cannot be positively said how the damage arose, the probability, under all the evidence, is that it arose after the boat was shifted". The Court said of the lighterage company: "It did nothing, so far as the evidence shows, that can be called negligence, and everything that it did do is shown." In other words, the appellee rebutted the presumption of negligence by proving to the Court that it was not negligent. *The Hildebrandt case is thus in accord with the*

Swenson case and the Terry & Tench case in holding that to escape liability the charterer must show that he has been free from negligence.

The appellees urge that the Hildebrandt case in effect overrules the Terry & Tench case and the Swenson case in their holding that the charterer, to escape liability, must show the cause of the loss. That this is or was intended to be the effect of this case we do not believe, for a number of reasons. It seems entirely unlikely that Judge Mack, coming from an outside circuit and sitting in the New York District Court, would give an oral opinion overruling a principle of law settled by the Circuit Court of Appeals of the Second Circuit. An examination of the opinion and also of the facts as brought out in the appendix to appellees' brief shows that he did not do this.

In the Hildebrandt case there was one bailee, the Flower Lighterage Company, and there was also the tugboat company, for whose actions the lighterage company was not responsible. The scow passed from one to the other. It was not positively shown in whose hands the injury occurred, although the Court said it probably happened after the scow was shifted by the tugboat company. The appellant urged that the tug was primarily liable.

The Court said:

> "*The tug was not the agent of the respondent, so as to make the respondent absolutely responsible for its acts, and* **therefore the respondent is not bound to show affirmatively** *that the tug shifted properly, and that the damage did not*

occur while the tug was shifting, or as a result of the shifting, or as a result of the tying up."

In other words, had the tugboat company and the lighterage company been one, and had it been shown that the scow was delivered to it in good order and received in bad order, the lighterage company would have been compelled to prove that the damage did not occur as a result of the shifting or mooring of the barge. To show this, the cause of the damage would clearly be brought out.

An examination of these two cases, therefore, makes it evident that there is nothing in either to indicate that the principles of the Terry or Swenson cases are overruled. If the Circuit Court of Appeals were to overrule the two earlier cases it would overrule them specifically. It is not made up of men who, instead of admitting former mistakes of law, overrule established principles by affirming without opinion oral opinions of courts below. However, the facts as above outlined make it clear that the Hastorf and Hildebrandt cases are entirely different in facts from the Terry and Swenson cases and the case at bar.

IV.

THE CAPTAIN MILLS THEORY.

The appellees continuously emphasize and state that the calculation of Captain Mills was "a calculation made before the injury to the lighter, and

not for the purposes of this suit" (Appellees' Brief, 41, 43, 44). It is true that Captain Mills first testified that this was the case. **He testified subsequently that it was made up several days after the date of the accident.** *A third time he said he did not know just when he made the calculation* (see opening brief, p. 35).

The appellees in their brief state relative to the draft marks of the ship:

> "The lens of the human eye was therefore in just as favorable a position for estimating the draft as was the photographic lens" (Appellees' Brief, 41).

We will not argue that the eye is not as accurate as a camera lens. We do say, however, that if by expert evidence made up by an expert after the cause of action arises a charterer can overthrow the uniform testimony of four disinterested witnesses who testified as to what they actually saw, then direct evidence of eye witnesses seems to be of very little value.

The admittedly incorrect testimony of Captain Mills, already discussed in our opening brief, makes it, in our opinion, unnecessary to discuss his testimony further.

V.

THE LOADING OF THE BARGE.

The "method of loading"—the piling in four cones—was probably sufficiently proper. It was

not the loading on Friday, Saturday and Sunday that broke this barge. There was evidently nothing wrong with the barge on Monday morning. **What broke the barge was the loading on her after foreman Messick demanded another barge on Monday morning. It was the piling of ton after ton on the barge after "she was really full".** It was "loading more and more" on the barge after the cones were so high that they commenced to slide (Messick, 233). The situation may be briefly summarized by saying that we have here a barge loaded with **heavy, sticky, clay ballast,** piled in four cones some fifteen feet high. One of the cones finally becomes so high that the clay slides towards an outboard corner, giving the barge a list. The barge is thereupon moved and loading resumed on the diagonally opposite corner. This creates a strain and results in buckling the barge and opening up her seams. The loading of ballast nevertheless continues, and is continued almost up to the time of her very destruction.

VI.

TRIMMING.

The appellant in its opening brief pointed out that the charterer in the case at bar did not attempt to trim the barge until after it had been buckled and disaster was imminent. The appellees answer:

> "Is there peculiar magic, anything sacrosanct, in the word 'trim'?" (Appellees' Brief, 47).

Appellees then argue that the ballast did not need trimming because it would spread out as buckets were dumped (id. 48). **So far as the ballast running like clean, dry sand, was concerned, it was not denied that the ballast was a wet, cakey, clayey sand and gravel mixture which would not run.** Of course it would "spill over the edge of the bucket if the bucket was too full" (id. 47), but so will coal and every other cargo which by its very nature must be trimmed in a ship.

VII.

THE FASTENING OF THE LINES.

Appellees urge that the Crowley Company was responsible for the method by which the lighter was made fast to the ship. The lighter was apparently made fast by the Crowley Company prior to the loading, and was later moved alongside the ship from time to time and refastened by the employees of the charterer or of its agents. We have no fault to find in the original fastening of the lighter to the ship, and we presume that the way in which the barge was made fast on Saturday and Sunday was not objectionable. However, the failure of the charterers to cut or loosen the lines on Monday, when the lighter listed outboard, was to invite its destruction. The pressure on the outboard side of the barge simply caused the inboard side to be jammed against the iron ship with such tremendous force that the lighter collapsed.

CONCLUSION.

This reply brief is very little more than an annotation of the appellees' brief. The undisputed facts brought out in our opening brief remain undisputed.

We therefore again repeat: If the libelant in this case cannot recover, not only has the law of charterer's liability been changed, but owners of demised vessels have been placed in a position where they have practically a negligible chance of recovering against charterers for injuries to lighters occurring while in the charterers' possession.

Dated, San Francisco,
May 24, 1922.

Respectfully submitted,

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Proctors for Appellant
(*Libelant*).

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